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No. 82-766

In The
Supreme Court of the United States
October Term, 1982

SECRETARY OF STATE OF MARYLAND,
Petitioner,

vs.

JOSEPH H. MUNSON COMPANY, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

JOINT APPENDIX

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Certiorari Granted January 10, 1983

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RELEVANT DOCKET ENTRIES

Date	Proceedings
1978 March 7	Complaint
1978 April 18	Motion to Dismiss
1978 May 26	Memorandum of Opinion and Order
1978 June 9	Answer of Defendant to Bill of Complaint
1980 May 13	Amended Bill of Complaint
1980 May 22	Answer to Plaintiffs Amended Bill of Complaint
1980 June 16	Case called for Hearing on Merits, Oral Stipulation agreed upon
1980 June 16	Memorandum of Law

1980	June	27	Supplemental Memorandum of Law
1980	July	1	Memorandum of Law
1980	July	2	Memorandum of Opinion and Order
1980	Aug.	1	Order of Appeal by Plaintiff
1981	Feb.	17	Argued and held sub curia. In the Court of Special Appeals of Maryland.
1981	March	11	Opinion of Court of Special Appeals affirming Judgment. C. J. Gilbert.
1981	April	10	Mandate issued.
1981	April	27	Petition for Writ of Certiorari filed. Court of Appeals of Maryland.
1981	May	7	Answer and Cross Petition for Writ of Certiorari filed.
1981	Nov.	4	Argued and held sub curia. In the Court of Appeals of Maryland.
1982	Aug.	5	Opinion of Court of Appeals of Maryland reversing judgment of the Court of Special Appeals and directing the reversal of the judgment of the Circuit Court for Anne Arundel County.
1982	Sept.	7	Mandate of Court of Appeals of Maryland.
1982	Nov.	3	Petition for a Writ of Certiorari.
1983	Jan.	10	Certiorari granted.

WHAT MAY BE FOUND IN THE APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

1. **Opinion of the Court of Appeals of Maryland filed August 5, 1982 ..... 1APC**
2. **Opinion of the Court of Special Appeals of Maryland filed March 11, 1981 ..... 23APC**
3. **Opinion and Order filed in the Circuit Court for Anne Arundel County dated July 2, 1980 ..... 38APC**

(Title Omitted)

BILL OF COMPLAINT

(Filed March 7, 1978)

Comes now the Plaintiff, Joseph H. Munson Company, Inc., an Indiana corporation, by and through its attorneys, Yale L. Goldberg and Mark A. Winkler, and respectfully represents unto this Honorable Court as follows:

COUNT I

(Declaratory Judgment)

1. That the Plaintiff is engaged in the promotion business, providing advice to various organization-clients desiring to promote entertainment events for profit.

2. That the Plaintiff's sole contracts in the State of Maryland are those with various chapters of the Fraternal Order of Police, which is an organization whose membership are police officers banded together for professional and social activities.

3. The said contract with the said chapters of the Fraternal Order of Police involve the promotion by the Plaintiff of entertainment events as a result of which the said chapters anticipate a profit.

4. Plaintiff's activities are limited to advising its clients as to how to go about promoting a particular entertainment event.

5. In no promotion of the sale of tickets do clients of the Plaintiff represent that the profits from the said

entertainment event and program will be used for a charitable purpose.

6. That the Plaintiff regularly charges the said chapters of the Fraternal Order of Police an amount in excess of twenty-five percent (25%) of the total gross income of the event which it is involved in promoting, not including proceeds received equal to the actual cost to the organization of goods, food, entertainment, or drinks sold or provided to the public and not including the actual postage paid to the United States Postal Service and printing expense in connection with the sale of tickets.

7. The Defendant is the Secretary of State for the State of Maryland and is charged, under Article 41, Section 103 A, et seq, with the responsibility of registering professional fund raisers and overseeing the provision of Section 103 D, which prohibits a charitable organization from paying or agreeing to pay as expenses in connection with any fund raising activity a total amount in excess of twenty-five percent (25%) of the total gross income raised or received by reason of the fund raising activity.

8. Section 103 L of the said Article provides for criminal sanctions in the event of a failure to comply with the registration provisions of the said Article, as well as criminal sanctions against the principals of a charitable organization as defined in the said statute, which contracts in contravention of the terms thereof. The said section further provides for authority in the Defendant to investigate alleged violations of the statute, to cancel the registration of the violator, to refer the matter to the Attorney General for civil enforcement or to refer the matter to the appropriate State's Attorney for prosecution.

9. The Defendant has been in contact with the Plaintiff through Plaintiff's counsel and has taken the position that the Plaintiff is subject to the above referred to statute and that the continued failure to comply therewith will require the Defendant to seek prosecution of the Plaintiff for violation of the said statute. That bringing of criminal prosecution against the Plaintiff would do the said Plaintiff irreparable harm.

WHEREFORE, the premises considered, the Plaintiff, Joseph H. Munson Company, Inc., an Indiana corporation, prays this Honorable Court, pursuant to the Annotated Code of Maryland, Courts and Judicial Proceedings, Sections 3-401 et seq, enter a declaratory judgment or decree to the effect that the Plaintiff is not violating nor has not, at any time in the past, violated the registration or fund raising limitations of Code Article 41, Sections 103 A et seq (1976 Cum. Supp.).

COUNT II

(Injunctive Relief)

Plaintiff adopts and incorporates by reference herein the factual allegations contained in Count I hereof, and for further cause of action states as follows:

1. That the potential damage, in the event the Defendant determines the Plaintiff to be subject to the registration requirements of Article 41, Section 103 A et seq and its contracts subject to the limitations contained in Article 41, Section 103 D, cannot be remedied by an award of monetary damages, since the damages cannot be ascertained; and no such award may be made against a State officer. There is, therefore, no adequate remedy at law.

WHEREFORE, the premises considered, Plaintiff prays that Defendant be enjoined from finding that the Plaintiff is subject to the registration provisions of Article 41, Section 103 A, et seq and that he be further enjoined from finding that the contracts entered into by and between the Plaintiff and the Fraternal Order of Police are subject to the requirements of Article 41, Section 103 D; and that all of said relief be granted *pendente lite* and permanently.

COUNT III

(Declaratory Relief)

For further cause of action, the Plaintiff adopts and incorporates by reference herein the factual allegations contained in Count I hereof, and for further cause of action states as follows:

1. That among the provisions of Article 41, Section 103 A et seq is that contained in Section 103 D that, "The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions."

2. The said statutory provision contains no guidelines or contains inadequate guidelines for the Secretary of State to utilize an establishment of such rules and regulations, and is therefore an improper delegation of legislative authority.

WHEREFORE, the premises considered, Plaintiff prays that a declaratory judgment or decree be entered

to the effect that Section 103 D of Article 41 of the Annotated Code of Maryland (1976 Cum. Supp.) be declared unconstitutional as an improper delegation of legislative authority.

COUNT IV

(Injunctive Relief)

Plaintiff adopts and incorporates by reference the factual allegations contained in Counts I and III hereof, and for further cause of action states that the potential damage to be done if the Plaintiff were required by the Defendant to limit its maximum fee in its contract with its clients, including Chapters of the Fraternal Order of Police, could not be remedied by an award of monetary damages, since the damages cannot be ascertained; and that no such award may be made against a State officer. There is, therefore, no adequate remedy at law.

WHEREFORE, the premises considered, Plaintiff prays that the Defendant Wineland be enjoined *pendente lite* and permanently from enforcing the terms and provisions of Article 41, Section 103 D of the Annotated Code of Maryland (1976 Cum. Supp.) for reason that the delegation by the Legislature to the Secretary of State of the responsibility for issuance of rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund raising activity more than 25% of its gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions, represents an unconstitutional delegation of legislative authority.

Signatures omitted

(Title Omitted)

MOTION TO DISMISS PLAINTIFF'S BILL OF COMPLAINT

(Filed April 18, 1978)

TO THE HONORABLE,
THE JUDGE OF SAID COURT:

Now comes the Defendant, Fred L. Wineland, Secretary of State, by Francis Bill Burch, Attorney General of Maryland, and James G. Klair, Assistant Attorney General, and moves pursuant to the provisions of Rule 321, MARYLAND RULES OF PROCEDURE, for dismissal of this action, and as reasons therefor says:

1. Plaintiff, Joseph H. Munson Company, Inc., an Indiana Corporation, has filed this action for declaratory and injunctive relief requesting that the Defendant Wineland be enjoined from finding Plaintiff in violation of the Charitable Solicitation Laws contained in Article 41, Section 103A *et seq.*, and that the Defendant Wineland be enjoined from enforcing the terms and provisions of Article 41, Section 103D, which limits the amount that can be allocated for fund-raising expenses. Further, the Plaintiff requests a declaratory judgment to the effect that they had not violated registration requirements of fund-raising limitations contained in Article 41, Section 103A *et seq.*, and that the provisions of Article 41, Section 103D imposing the fund-raising limitation be declared unconstitutional as "an improper delegation of legislative authority."

2. In its Bill of Complaint, Plaintiff alleges that it is engaged in the business of promoting entertainment

events solely for various Chapters of the Fraternal Order of Police "an organization whose membership are police officers banded together for professional and social activities." As a result of these events, the various Chapters anticipate a profit. Plaintiff's activities are limited to advising its clients how to go about promoting a particular entertainment event. It is alleged that "[i]n no promotion of the sale of tickets do clients of the Plaintiff represent that the profits from the said entertainment event and program will be used for a charitable purpose." For its services, the Plaintiff regularly charges the Chapters of the Fraternal Order of Police an amount in excess of twenty-five percent (25%) of the total gross income of the event, not including proceeds received equal to the actual cost to the organization of goods, food, entertainment, or drinks sold or provided to the public and not including the actual postage paid to the United States Postal Service and printing expense in connection with the sale of tickets.

3. Chapter 679, Acts 1976, effective July 1, 1976, enacted Article 41, Sections 103A-103L, which provides for the registration and regulation of charitable organizations which solicit funds from the public for charitable purposes. Section 103B of Article 41 requires that every charitable organization, which intends to solicit contributions or to have funds solicited on its own behalf, file a registration statement with the Secretary of State. Various exemptions from this registration requirement are contained in Section 103C of Article 41 and include *bona fide* fraternal or sororal organizations if all of their fundraising activities are carried on by the members of the organization or an affiliate of it, and the members re-

ceive no compensation for performing these activities (Section 103C(a) (7)). Registration and bond requirements for professional fund-raiser counsel and professional solicitors are contained in Section 103F of Article 41. A professional fund-raiser counsel is any person who for a fee under any agreement plans, conducts, manages, carries on, advises or acts as a consultant, whether directly or indirectly, in connection with soliciting contributions for, or on behalf of, a charitable organization but who does not actually solicit contributions as a part of his services. Section 103A(g).

Limitations on the amount of payments that can be made for fund-raising activities is contained in Section 103D of Article 41. Generally, a charitable organization other than a charitable salvage organization, may not pay or agree to pay as expenses in connection with any fund-raising activity a total amount in excess of twenty-five percent (25%) of the total gross income raised or received by reason of the fund-raising activity. Pursuant to the legislative mandate contained in Section 103D(a), the Secretary of State has promulgated regulations pertaining to the twenty-five percent (25%) limitation. Under Section 103D of Article 41, and in accordance with this regulation, the Secretary of State may permit an organization to exceed the twenty-five percent (25%) limitation upon a showing that it is necessary to the accomplishment of the organization's charitable purpose and that there is no other reasonable alternative. See COMAR 01.02. 04.05. Any person whose application for waiver of the twenty-five percent (25%) limitation, pursuant to Article 41, Section 103D is rejected by the Secretary has a right to a hearing in accordance with the Administrative Procedure

Act from which there is a right to judicial review. COMAR 01.02.03.

4. An action for declaratory judgment cannot be maintained unless certain essential elements are present. One of these elements is that a justifiable controversy must exist. There must be some interested parties asserting adverse claims upon a state of facts which must have accrued wherein a legal decision is sought. *Prince George's County v. Board of Trustees*, 269 Md. 9 (1973). Section 3-409 of the Courts and Judicial Proceedings Article, states that a court may grant a declaratory judgment in a civil case if . . . "an actual controversy exists between contending parties [or] if antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation." Absent an actual controversy, the courts of Maryland will not decide purely theoretical questions. *Prince George's County v. Chillum-Adelphi Vol. Fire Dept.*, 275 Md. 374 (1975).

5. In the instant case there is clearly a lack of an actual controversy. Plaintiff has alleged, in its Bill of Complaint, that it is in "promotion business" providing advice to various organization-clients desiring to promote entertainment events for profit. Plaintiff deals solely in this State with various Chapters of the Fraternal Order of Police, which the Plaintiff contends are organizations whose membership are police officers banded together for "professional and social activities." In the promotion of the sale of tickets, it is alleged that no representations of charitable purposes are made. It would appear that if Plaintiff is not contracting with a charitable organization as defined in Section 103A(b) and is not directly or indirectly engaging or assisting with the solicitation of con-

tributions by a charitable organization for charitable purposes then it is not bound by the twenty-five percent (25%) limitation and no controversy exists. Even if Plaintiff did assist in the promotion of an event for an organization regulated by Article 41, Section 103A *et seq.*, there is still no actual controversy and Plaintiff lacks standing to seek a declaratory judgment.

6. The Maryland Court of Appeals has consistently stated that administrative remedies must be exhausted before initiating the declaratory judgment proceeding. *Friendship Heights v. Funger*, 265 Md. 339 (1972); *Gingell v. Board of County Commissioners*, 249 Md. 374 (1968); *Poe v. Mayor of Baltimore City*, 241 Md. 303 (1966); *Pressman v. D'Alesandro*, 211 Md. 50 (1956); *Pressman v. State Tax Commission*, 204 Md. 78 (1954); *Tanner v. McKeldin*, 202 Md. 569 (1953). In the present case, Plaintiff has not exhausted his administrative remedies in that there has been no request for hearing pursuant to COMAR .01 .02 .03. Until the Secretary of State has had the opportunity to fully review the factual situation and consider a waiver of the twenty-five percent (25%) limitation and make a determination of whether the solicitation is for a charitable or noncharitable purpose. Plaintiff's administrative remedies have not been exhausted and its request for declaratory relief should be dismissed. *Patuxent Oil Co. v. County Commissioners*, 212 Md. 543 (1957); *Tanner v. McKeldin, supra.*

WHEREFORE, the Defendant, Fred L. Wineland, Secretary of State for the State of Maryland, prays and urges this Court to dismiss this action seeking injunctive and declaratory relief.

Signatures and certification omitted

IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY

EQUITY NO. 24,949

JOSEPH H. MUNSON COMPANY, INC.,
An Indiana Corporation,

Plaintiff,

vs.

FRED L. WINELAND, Secretary of State
for the State of Maryland,

Defendant.

CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

MEMORANDUM OF OPINION AND ORDER

(Filed May 26, 1978)

This case comes before the Court on the Defendant's Motion to Dismiss the Plaintiff's Bill of Complaint. The Defendant, Fred L. Wineland, Secretary of State for the State of Maryland, filed his Motion on April 18, 1978. The Plaintiff, Joseph H. Munson Company, Inc., has failed to file an Answer to the Motion within the fifteen day period allowed under Maryland Rule 321. The Court will, therefore, decide the issues raised by the Motion without a hearing.

The Plaintiff filed its Bill of Complaint on March 7, 1978. The Bill of Complaint contains four counts, but raises only two basic issues. Count I seeks a Declaratory Judgment holding that the Plaintiff is not in violation of the Charitable Organizations Act, Article 41, Section 103A-103L, of the *Annotated Code of Maryland*. Count II seeks an Injunction to prevent the Defendant from finding the

Plaintiff is violating this statute. Count III seeks a Declaratory Judgment holding that the Charitable Organizations Act is an unconstitutional delegation of legislative authority. Count IV seeks an Injunction to prevent the Defendant from enforcing the Charitable Organizations Act, based on its unconstitutionality.

The Defendant's Motion to Dismiss is addressed primarily to the issue raised in Counts I and II of the Bill of Complaint. The Defendant contends that the Plaintiff is not entitled to declaratory relief, as it has not exhausted its administrative remedies. He also contends that there is no justiciable controversy present in this case, and that declaratory relief is thus unavailable.

The Court first notes that the Defendant's second contention cannot be determined at this point. The Plaintiff's Bill of Complaint and the Defendant's Motion to Dismiss present two distinct versions of the status of this "controversy". The Bill of Complaint alleges that the Defendant has threatened criminal action if the Plaintiff does not comply with the provisions of the Charitable Organizations Act. The Motion to Dismiss alleges that the Defendant has not yet made a determination as to whether or not the Plaintiff is subject to the provisions of the Charitable Organizations Act. (An opportunity to make findings of fact on this issue is necessary before the Court can make a determination.) On the face of the Bill of Complaint, the threatened criminal prosecution would constitute a justiciable controversy. *Grimm v. County Commissioners of Washington County*, 252 Md. 626 (1969).

The Court can resolve the issue of the Plaintiff's failure to exhaust the available administrative remedies and

the effect thereof on the availability of declaratory relief. It is a well established principal that when a special form of remedy is provided by statute declaratory relief is unavailable.

The principal that special forms of remedy take precedence over declaratory relief is firmly established by a long line of Maryland cases. A number of these cases are set forth in the Motion to Dismiss and they will not be repeated here. This principal is also incorporated in the Declaratory Judgment Act, Courts and Judicial Proceedings Article, Section 3-409(b), of the *Annotated Code of Maryland*. An essential reason for this principal, and a means of testing its applicability, is that matters within the expertise of a special forum should be decided by that body.

In the present case a special form of remedy does exist. Effective February 10, 1978, a hearing procedure was established under Title 01:02:03 of the Code of Maryland Regulations, for controversies arising under the Charitable Organizations Act. (The Order adopting these procedures can be found at 5:3 Maryland Register 134. The text of these procedures can be found at 4:26 Maryland Register 2026-2028.) This hearing procedure, including the right to judicial review, is governed by the Administrative Procedure Act, Article 41, Sections 244-256A, of the *Annotated Code of Maryland*.

The Court finds that the issue raised by Counts I and II of the Bill of Complaint is within the area of the Secretary of State's expertise. These Counts deal with the applicability of the Charitable Organizations Act to the Plaintiff. The establishment of a special form of

remedy which places such determinations before the Secretary of State and the provisions of Article 41, Sections 102A-103L, of the *Annotated Code of Maryland*, can lead to no other conclusion.

The Court, for the aforegoing reasons, will grant the Motion to Dismiss as to Counts I and II.

The issue raised by Counts III and IV presents a more difficult matter for the Court's determination. The Plaintiff has challenged the constitutionality of the delegation of legislative authority to the Secretary of State involved in Article 41, Sections 103A-103L, of the *Annotated Code of Maryland*.

The Court first notes that the Defendant's exhaustion of administrative remedies argument is unavailing to his Motion to Dismiss as to Counts III and IV. The constitutionality of a particular legislative enactment has traditionally been a matter properly reserved for judicial determination, if there is no by-passing of an administrative agency in a case calling for a determination of facts within the sphere of the agency's expertness. *Pressman v. State Tax Commission*, 204 Md. 78 (1954) and cases cited therein.

The Court, in Pressman, supra, specifically held that a declaratory judgment was proper when a statute's constitutionality was challenged on the ground that its title was not descriptive of the body. In, *Schneider v. Pullen*, 198 Md. 64 (1951), it was held that a party must use the special form of remedy provided when he challenged the constitutionality of rules and regulations promulgated under a statute. But he is entitled to seek declaratory relief when he challenges the statute's constitutionality.

This case is of particular interest to this Court because the Appellant was held to have a right to challenge a statute's constitutionality on the ground of its being an improper delegation of legislative authority by way of an action for a declaratory judgment and injunction. Similarily, in, *Nottingham Village, Inc. et al v. Baltimore County, Maryland*, 266 Md. 334 (1972), it was held that available administrative remedies need not be exhausted when the constitutionality of the statute's general validity is challenged. This case also involved an action for declaratory relief and an injunction. Finally, in, *Maryland-National Capital Park and Planning Commission et al v. Washington National Arena*, 37 Md. App. 346 (1977), the Court, while finding a special exception for tax cases, quoted, *Schneider, supra*, extensively as authority for when a party may and may not proceed by way of declaratory relief without exhausting administrative remedies.

The Court concludes that the present case is controlled by the decision in, *Schneider, supra*. Counts III and IV should not and will not be dismissed for failure to exhaust administrative remedies, as they challenge the Charitable Organizations Act's constitutionality on the ground that it entails an impermissible delegation of legislative authority.

The Court has previously stated its opinion on the issue of whether a justiciable controversy exists in this case. The Plaintiff has certainly alleged a sufficiently justiciable controversy to carry it past the Defendant's Motion to Dismiss.

ORDER

Upon the aforegoing Memorandum of Opinion, it is this 25th day of May, 1978, by the Circuit Court for Anne Arundel County, in Equity,

ORDERED, that the Defendant's Motion to Dismiss is hereby granted as to Counts I and II of the Bill of Complaint, as the Plaintiff has failed to exhaust the administrative remedy provided in Title 01:02:03 of the Code of Maryland Regulations, and it is further,

ORDERED, that the Defendant's Motion to Dismiss is hereby denied as to Counts III and IV of the Bill of Complaint.

/s/ H. Chester Goudy, Jr.

Judge

cc: James G. Klair, Esquire
Yale L. Goldberg, Esquire

(Title Omitted)

ANSWER OF THE DEFENDANT TO BILL OF COMPLAINT

(Filed June 9, 1978)

TO THE HONORABLE,
THE JUDGES OF SAID COURT:

Now comes the Defendant, Fred L. Wineland, Secretary of State for the State of Maryland, by his attorneys, Francis Bill Burch, Attorney General of Maryland, and James G. Klair, Assistant Attorney General, pursuant to Rules 371 and 372, in answer to the Bill of Complaint, says:

1. The Plaintiff filed a four-count Bill of Complaint challenging the applicability and the constitutionality of the Charitable Organizations Act, Article 41, Sections 103 A-103L, of the Annotated Code of Maryland.

2. The Defendant filed a Motion to Dismiss, which was granted by this Court on May 25, 1978, as to Counts I and II, and denied as to Counts III and IV of the Bill of Complaint.

3. Counts III and IV of the Bill of Complaint incorporates by reference the factual allegations contained in Count I.

4. The Defendant is unable to admit or deny the allegations contained in Paragraphs 1, 2, 3, 4, 5 and 6 of Count I because he is without adequate knowledge as to those allegations.

5. The Defendant admits the allegations contained in Paragraphs 7 and 8 of Count I with the exception that the 25% limitation under Section 103D does not apply to compensation or expenses paid by a charitable organization to a professional fund-raiser counsel for conducting feasibility studies for the purpose of determining whether or not the charitable organization should undertake a fund-raising activity, such compensation or expenses paid for feasibility studies or preliminary planning not being considered to be expenses paid in connection with a fund-raising activity. Additionally, for purposes of that section, the total gross income raised or received shall be adjusted so as not to include contributions received equal to the actual cost to the charitable organization of (1) goods, food, entertainment, or drink sold or provided to the public, nor should these costs be included as fund-

rais'ng costs, and (2) the actual postage paid to the United States Postal Service and printing expenses in connection with the solicitation of contributions, nor should these costs be included as fund-raising costs.

6. The Defendant denies the allegations in Paragraph 9 of Count I as there has been no determination concerning the applicability of the statute to the Plaintiff or that he is in violation of the Charitable Solicitation Act.

7. The Defendant admits the allegations contained in Paragraph 1 of Count III.

8. The Defendant denies the allegations contained in Paragraph 2 of Count III.

9. The Defendant is unable to admit or deny the allegations contained in Count IV because the Defendant is without adequate knowledge to respond to that allegation.

10. And further answering the Bill of Complaint, the Defendant avers that Article 41, Section 103D, Annotated Code of Maryland (1977 Cum. Supp.) has been duly enacted and does not contain any constitutional infirmity. Notwithstanding the factual allegations contained in the Bill of Complaint, this statute does not contain any improper delegation of legislative authority as a matter of law.

Signatures and certification omitted

(Title Omitted)

AMENDED BILL OF COMPLAINT

(Filed May 13, 1980)

Comes now the Plaintiff, Joseph H. Munson Company, Inc., an Indiana corporation, by and through its attorneys, Yale L. Goldberg and Mark A. Winkler, and respectfully represents unto this Honorable Court as follows:

COUNT I

(Declaratory Judgment)

1. That the Plaintiff is engaged in the promotion business, providing advice to various organization-clients desiring to promote entertainment events for profit.

2. That the Plaintiff's sole contracts in the State of Maryland are those with various chapters of the Fraternal Order of Police, which is an organization whose membership are police officers banded together for professional and social activities.

3. The said contract with the said chapters of the Fraternal Order of Police involve the promotion by the Plaintiff of entertainment events as a result of which the said chapters anticipate a profit.

4. Plaintiff's activities are limited to advising its clients as to how to go about promoting a particular entertainment event.

5. In no promotion of the sale of tickets do clients of the Plaintiff represent that the profits from the said entertainment event and program will be used for a charitable purpose.

6. That the Plaintiff regularly charges the said chapters of the Fraternal Order of Police an amount in excess of twenty-five percent (25%) of the total gross income of the event which it is involved in promoting, not including proceeds received equal to the actual cost to the organization of goods, food, entertainment or drinks sold or provided to the public and not including the actual postage paid to the United States Postal Service and printing expense in connection with the sale of tickets.

7. The Defendant is the Secretary of State for the State of Maryland and is charged, under Article 41, Section 103 A, et seq., with the responsibility of registering professional fund raisers and overseeing the provision of Section 103 D, which prohibits a charitable organization from paying or agreeing to pay as expenses in connection with any fund raising activity a total amount in excess of twenty-five percent (25%) of the total gross income raised or received by reason of the fund raising activity.

8. Section 103 L of the said Article provides for criminal sanctions in the event of a failure to comply with the registration provisions of the said Article, as well as criminal sanctions against the principals of a charitable organization as defined in the said statute, which contracts in contravention of the terms thereof. The said section further provides for authority in the Defendant to investigate alleged violations of the statute, to cancel the registration of the violator, to refer the matter to the Attorney General for civil enforcement or to refer the matter to the appropriate State's Attorney for prosecution.

9. The Defendant has been in contact with the Plaintiff through Plaintiff's counsel and has taken the position

that the Plaintiff is subject to the above referred to statute and that the continued failure to comply therewith will require the Defendant to seek prosecution of the Plaintiff for violation of the said statute. That bringing of criminal prosecution against the Plaintiff would do the said Plaintiff irreparable harm.

WHEREFORE, the premises considered, the Plaintiff, Joseph H. Munson Company, Inc., an Indiana corporation, prays this Honorable Court, pursuant to the Annotated Code of Maryland, Courts and Judicial Proceedings, Sections 3-401 et seq., enter a declaratory judgment or decree to the effect that the Plaintiff is not violating nor has not, at any time in the past, violated the registration or fund raising limitations of Code Article 41, Sections 103 A et seq. (1976 Cum. Supp.).

COUNT II

(Injunctive Relief)

Plaintiff adopts and incorporates by reference herein the factual allegations contained in Count I hereof, and for further cause of action states as follows:

1. That the potential damage, in the event the Defendant determines the Plaintiff to be subject to the registration requirements of Article 41, Section 103 A et seq. and its contracts subject to the limitations contained in Article 41, Section 103 D, cannot be remedied by an award of monetary damages, since the damages cannot be ascertained; and no such award may be made against a State officer. There is, therefore, no adequate remedy at law.

WHEREFORE, the premises considered, Plaintiff prays that Defendant be enjoined from finding that the

Plaintiff is subject to the registration provisions of Article 41, Section 103 A, et seq. and that he be further enjoined from finding that the contracts entered into by and between the Plaintiff and the Fraternal Order of Police are subject to the requirements of Article 41, Section 103 D; and that all of said relief be granted *pendente lite* and permanently.

COUNT III

(Declaratory Relief)

For further cause of action, the Plaintiff adopts and incorporates by reference herein the factual allegations contained in Count I hereof, and for further cause of action states as follows:

1. That among the provisions of Article 41, Section 103 A et seq. is that contained in Section 103 D that, "The Secretary of State shall issue rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund raising activity more than 25% of its total gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions."

2. That said statutory provision contains no guidelines or contains inadequate guidelines for the Secretary of State to utilize an establishment of such rules and regulations, and is therefore an improper delegation of legislative authority.

WHEREFORE, the premises considered, Plaintiff prays that a declaratory judgment or decree be entered to the effect that Section 103 D of Article 41 of the Annotated Code of Maryland (1976 Cum. Supp.) be declared

unconstitutional as an improper delegation of legislative authority.

COUNT IV

(Injunctive Relief)

Plaintiff adopts and incorporates by reference the factual allegations contained in Counts I and III hereof, and for further cause of action states that the potential damage to be done if the Plaintiff were required by the Defendant to limit its maximum fee in its contract with its clients, including Chapters of the Fraternal Order of Police, could not be remedied by an award of monetary damages, since the damages cannot be ascertained; and that no such award may be made against a State officer. There is, therefore, no adequate remedy at law.

WHEREFORE, the premises considered, Plaintiff prays that the Defendant Wineland be enjoined *pendente lite* and permanently from enforcing the terms and provisions of Article 41, Section 103 D of the Annotated Code of Maryland (1976 Cum. Supp.) for reason that the delegation by the Legislature to the Secretary of State of the responsibility for issuance of rules and regulations to permit a charitable organization to pay or agree to pay for expenses in connection with a fund raising activity more than 25% of its gross income in those instances where the 25% limitation would effectively prevent the charitable organization from raising contributions, represents an unconstitutional delegation of legislative authority.

COUNT V

(Declaratory Relief)

Plaintiff adopts and incorporates by reference the factual allegations contained in Count I hereof and for further cause of action states as follows:

1. That Article 41, Sections 103, et seq. (1976 Cum. Supp.) of the Annotated Code of Maryland, which prohibits a charitable organization from paying or agreeing to pay as expenses in connection with any fund raising activity a total amount in excess of 25% of the total gross income raised or received by reason of the fund raising activity, is unconstitutional and in violation of the First and Fourteenth Amendments of the United States Constitution, as it violates the Plaintiff's right to free speech and assembly and unduly intrudes thereon.

WHEREFORE, the premises considered, Plaintiff, Joseph H. Munson Company, Inc., an Indiana corporation, prays this Honorable Court, pursuant to the Annotated Code of Maryland, Courts and Judicial Proceedings, Section 3-401 et seq., enter a Declaratory Judgment or decree to the effect that Article 41, Section 103 et seq. (1976 Cum. Supp.) of the Annotated Code of Maryland prohibiting a charitable organization from paying or agreeing to pay as expenses in connection with any fund raising activity a total amount in excess of 25% of the total gross income raised or received by reason of the fund raising activity is unconstitutional and in violation of the Plaintiff's rights under the First and Fourteenth Amendments to the United States Constitution.

Signatures and certification omitted

(Title Omitted)

ANSWER TO PLAINTIFF'S AMENDED BILL OF COMPLAINT

(Filed May 22, 1980)

TO THE HONORABLE,
THE JUDGES OF SAID COURT:

Now comes the Defendant, Fred L. Wineland, Secretary of State for the State of Maryland, by his attorneys, Stephen H. Sachs, Attorney General of Maryland, and James G. Klair, Assistant Attorney General, pursuant to Rule 320 Maryland Rules of Procedure and in answer to the Amended Bill of Complaint says:

1. Plaintiff has filed a five count Amended Bill of Complaint challenging the applicability and constitutionality of the Charitable Organizations Act, Article 41, §§ 103A-103L of the Annotated Code of Maryland.

2. The Amended Bill of Complaint adds an additional count alleging a violation of Plaintiff's right to free speech and assembly in violation of the First and Fourteenth Amendments of the United States Constitution.

3. The Defendant filed a Motion to Dismiss to the original Bill of Complaint which was granted by this Court on May 25, 1978 as to Counts I and II and denied as to Counts III and IV of the Bill of Complaint. Since Counts I and II of the Amended Bill of Complaint are identical to the previous counts, they should be dismissed pursuant to this Court's order of May 25, 1978.

4. Counts III, IV and V of the Bill of Complaint incorporate by reference the factual allegations contained in Count I.

5. The Defendant is unable to admit or deny the allegations contained in Paragraphs 1, 2, 3, 4, 5 and 6 of Count I because he is without adequate knowledge as to those allegations.

6. The Defendant admits the allegations contained in Paragraphs 7 and 8 of Count I with the exception that the 25% limitation under § 103D does not apply to compensation or expenses paid by a charitable organization to a professional fund raiser counsel for conducting feasibility studies for the purpose of determining whether or not the charitable organization should undertake a fund raising activity, such compensation or expenses paid for feasibility studies or preliminary planning not being considered to be expenses paid in connection with a fund raising activity. Additionally, for purposes of that section, the total gross income raised or received shall be adjusted so as not to include contributions received equal to the actual cost to the charitable organization of (1) goods, food, entertainment, or drinks sold or provided to the public, nor should these costs be included as fund raising costs, and (2) the actual postage paid to the United States Postal Service and printing expenses in connection with the solicitation of contributions, nor should these costs be included as fund raising costs.

7. The Defendant denies the allegations contained in Paragraph 9 of Count I as there has been no determination concerning the applicability of the statute to the Plaintiff or that he is in violation of the Charitable Solicitation Act.

8. The Defendant admits the allegations contained in Paragraph 1 of Count III.

9. The Defendant denies the allegations contained in Paragraph 2 of Count III.

10. The Defendant is unable to admit or deny the allegations contained in Count IV because the Defendant is without adequate knowledge to respond to that allegation.

11. The Defendant denies the allegations contained in Count V.

12. In further answering the Amended Bill of Complaint, the Defendant avers that Article 41, § 103D, Annotated Code of Maryland (1978 Repl. Vol.) has been duly enacted and does not contain any constitutional infirmity. Notwithstanding the factual allegations contained in the Amended Bill of Complaint, the statute does not contain any improper delegation of legislative authority as a matter of law.

Signatures and certification omitted

(Title Omitted)

SUPPLEMENTAL MEMORANDUM OF LAW

(Filed June 27, 1980)

TO THE HONORABLE,
THE JUDGE OF SAID COURT:

This case involves a declaratory judgment action filed by the plaintiff, an Indiana corporation, pursuant to the Maryland Uniform Declaratory Judgments Act. Courts and Judicial Proceedings Article § 3-401 *et seq.* In essence, the corporate plaintiff, while not challenging the constitutionality of the entire Charitable Organizations

Act, does attack § 103D of Article 41, which imposes a fund raising limitation, as unconstitutional. At a hearing before this Court, counsel were requested to address in a legal memorandum the question of standing of the corporate plaintiff to properly litigate in a declaratory judgment action the constitutionality of § 103D.

From the beginning of this action, which was filed some twenty-seven months ago, the defendant has argued that there are serious questions concerning the standing of the corporate plaintiff to bring this action. Clearly, a private corporation can, under the proper circumstances, bring an action challenging the validity of a statutory provision. § 3-401 Courts and Judicial Proceedings Article. Under the Uniform Declaratory Judgments Act, constitutional issues may be decided provided that there is no bypassing of an administrative agency. *Reed v. McKeldin*, 207 Md. 553 (1955). Thus, an action for a declaratory judgment will lie to determine the construction or validity of a statute or ordinance, but not where the essential elements requisite to declaratory relief are not present, as where there is no actual controversy between the parties.

Article 41, § 103D precludes a charitable organization (other than a charitable salvage organization) to pay or agree to pay as expenses in connection with any fund-raising activity a total amount in excess of twenty-five percent (25%) of the total gross income raised unless a waiver of that limitation has been obtained from the Secretary of State pursuant to rules and regulations promulgated by the Secretary. Therefore, § 103D is directed to the acts of the charitable organization rather than a promoter, professional fund raiser or other entity. The cor-

porate plaintiff in this action is not a charitable organization, but is a promoter of fund raising events. Thus, the enforcement of § 103D would be directed against the charitable organization rather than the promoter who lacks standing to challenge the limitation on behalf of the charitable organization. *See Association of Independent Taxi Operators v. Yellow Cab Co.*, 198 Md. 181 (1951); *Crider v. Cullen*, 191 Md. 723 (1949). Furthermore, an actual controversy must exist between the parties in order to have standing in a declaratory judgment action. *Prince George's County v. Bd. of Trustees*, 269 Md. 9 (1973). Section 3-409 of Courts and Judicial Proceedings Article state that a court may grant a declaratory judgment in a civil case if ". . . an actual controversy exists between contending parties [or] if antagonistic claims are present between the parties involved which indicate imminent and inevitable litigation." Absent an actual controversy, the courts of Maryland will not decide purely theoretical questions. *Prince George's County v. Chillum-Adelphi Vol. Fire Dept.*, 275 Md. 374 (1975).

In the present case there is clearly a lack of actual controversy. The corporate plaintiff has alleged that it is in the "promotion business" providing advice to various organizations-clients desiring to promote entertainment events for profit. Plaintiff deals solely in this State with various chapters of the Fraternal Order of Police which it contends are organizations whose memberships are police officers banded together for "professional and social activities". In the promotion of the sale of tickets, it is alleged that no representations of charitable purposes are made. It would appear that if plaintiff is not contracting with a charitable organization as de-

fined in § 103A(b) and is not directly or indirectly engaged or assisting with the solicitation of contributions by a charitable organization for charitable purposes, then the twenty-five percent (25%) limitation does not apply and no actual controversy exists.

Plaintiff has failed to show that it has ever asked for a ruling from the Secretary of State pursuant to the various rules and regulations promulgated to administer the Charitable Solicitation Act, as to the applicability of the Act to its activities. Clearly, the Secretary of State could hold a hearing to determine whether plaintiff is affected by the Act which then could give rise to a controversy. Plaintiff has failed to take this initial step and, in fact, has not shown any evidence that it is in imminent danger of harm. Certainly nothing has occurred during the twenty-eight months this case has been pending. The defendant submits that because the administrative remedies have been by-passed and since there appears to be no actual controversy established by the plaintiff and because the corporate plaintiff cannot challenge a statutory provision which is applied to charitable organizations rather than promoters, the plaintiff does not have standing to challenge the twenty-five percent (25%) limitation contained in § 103D of Article 41. *Pressman v. State Tax Comm'n*, 204 Md. 78 (1954) and cases cited therein.

For these reasons, the defendant requests that this Honorable Court dismiss the Bill of Complaint seeking declaratory and injunctive relief on the basis that the corporate plaintiff lacks standing to challenge § 103D of Article 41.

Signatures and certification omitted

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